

# ARKANSAS COURT OF APPEALS

## DIVISION II

No. CA 07-653

CRYSTAL RENE (BOYCE) YOUNG  
APPELLANT

V.

JASON PRICE BOYCE

APPELLEE

Opinion Delivered APRIL 16, 2008

APPEAL FROM THE WHITE  
COUNTY CIRCUIT COURT,  
[DR-2004-909-3]

HONORABLE CRAIG HANNAH,  
JUDGE

AFFIRMED

**JOHN B. ROBBINS, Judge**

Appellant Crystal Renea (Boyce) Young and appellee Jason Price Boyce were married on September 6, 2003, and divorced on May 23, 2005. The parties have one child together, Melea, who was born on August 20, 2002. The divorce decree awarded joint custody, with physical custody and primary care of Melea to Ms. Young subject to reasonable visitation by Mr. Boyce. In addition, Mr. Boyce was awarded visitation with his step-sons, Christopher and Nathaniel. Mr. Boyce was ordered to pay \$54 per week in child support for Melea.

On November 1, 2005, Mr. Boyce filed a complaint for change of custody. In relevant part, Mr. Boyce's complaint asserted:

3. Subsequent to May 23, 2005, there has been a material change of circumstances which causes the defendant [Mr. Boyce] to believe it would be in the best interest of the minor child that physical custody of the child be placed with him. These circumstances include but are not limited to:

- a. The plaintiff [Ms. Young] leaving Melea in the care of her maternal grandmother extensively while plaintiff was staying/living with her boyfriend who is now her husband.
  - b. The plaintiff's husband, James Young, was arrested for a probation violation before the White County Circuit Court.
  - c. The plaintiff's failure to maintain appropriate living conditions in her apartment; and,
  - d. The plaintiff contacting the defendant on Friday, October 21, 2005 and informing the defendant that she was going to Texas because a relative was dying. The plaintiff left Melea in the defendant's care informing him that she would contact him when she got to Texas. As of October 31, 2005, the defendant has had no contact from the plaintiff and has been unable to locate a "dying" relative know to the other members of the plaintiff's family. The plaintiff's husband, James Young, failed to appear before the Honorable Judge Bill Mills on October 27, 2005, for a probation revocation hearing and a warrant has been issued for his arrest.
4. The defendant has been in contact with Marrietta Neff, the plaintiff's mother, who has advised him that she does not know the current location of the plaintiff, plaintiff's husband or Melea's half-siblings. The defendant has reasonable cause to believe the plaintiff has fled the State of Arkansas with her spouse and is in hiding. The defendant believes the plaintiff may return to the State of Arkansas and attempt to take Melea and leave the state for an unknown location with the child. This court should issue a restraining order prohibiting the minor child from leaving White County, Arkansas in the custody of the plaintiff.
5. A temporary hearing should be held in this matter to place temporary custody of Melea with the defendant and other protective orders deemed appropriate entered by the court.
6. Upon a final hearing in this case, physical custody of the child should be placed with the defendant.

Pursuant to appellee's complaint, the trial court entered an ex-parte order awarding temporary custody to Mr. Boyce on November 7, 2005. On December 28, 2005, an agreed amended temporary order was entered, which continued temporary custody of Melea with Mr. Boyce subject to Ms. Young's visitation, and ordered Ms. Young to pay \$25 in weekly child support. Mr. Boyce retained custody until the final hearing.

On October 4, 2006, the final hearing was held on Mr. Boyce's complaint for a change of custody. On April 2, 2007, the trial court entered an order awarding physical custody and

primary care of Melea to Mr. Boyce based upon its findings that there had been a material change in circumstances since the date of the divorce decree, and that a change of custody was in Melea's best interest. Ms. Young was awarded visitation and ordered to pay \$43 in weekly child support. Ms. Young now appeals from that order, arguing that (1) there was insufficient evidence of a material change in circumstances, and (2) the trial court erred in finding that it was in Melea's best interest to be placed in the custody of her father given that he is a convicted sex offender. We affirm.

In child-custody cases, we review the evidence de novo, but we do not reverse the findings of the trial court unless it is shown that they are clearly contrary to the preponderance of the evidence. *Henley v. Medlock*, 97 Ark. App. 45, \_\_ S.W.3d \_\_ (2006). A finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). The original decree is a final adjudication that one parent or the other was the proper person to have care and custody of the children. *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003). In order to promote stability and continuity in the life of the child, and to discourage repeated litigation of the same issue, modifications in custody require a more stringent standard than that of the original custody determination. *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001). For a change of custody, the trial court must first determine that a material change in circumstances has occurred since the last order of custody; if that threshold requirement is met, it must then determine who should have custody with the sole consideration being the best interest of the children. *Tipton v. Aaron*, 87 Ark. App. 1, 185 S.W.3d 142 (2004).

At the hearing held October 4, 2006, Ms. Young testified that she currently lives in a mobile home behind her mother's property. Ms. Young continues to have custody of Melea's half-brothers, who at the time of the hearing were five and six years old. Ms. Young stated that she did not work and was supported by her mother in 2005, but that she is currently employed as a cashier at Sav-A-Lot, where she has worked for six weeks. Ms. Young acknowledged past methamphetamine abuse, for which she was in rehabilitation from December 2005 through March 2006. Ms. Young maintained that she has not used drugs since then.

Since divorcing Mr. Boyce, Ms. Young married and then divorced James Young. Mr. Young is a convicted felon who was on probation during the marriage and was later sent to prison for a probation violation. Ms. Young acknowledged that while she had custody of Melea and was living with Mr. Young, it was not a drug-free home. In fact, she stated that "we both stayed on drugs through the divorce."

Ms. Young testified that in late October of 2005, Mr. Young asked her to accompany him to Florida to his grandmother's house. She agreed, and she enrolled her two sons in school while in Florida with the anticipation of staying for a few weeks. Before leaving Arkansas, Ms. Young delivered Melea over to Mr. Boyce and told him she was traveling to Texas to visit relatives. Ms. Young never went to Texas nor had any intention of doing so. She stated that she returned to Arkansas three weeks later on November 11, 2005, at which time she was served with appellee's complaint for change of custody. Ms. Young acknowledged that she advised her attorney on December 12, 2005, that she would not be able to pass a drug screen for methamphetamine.

Ms. Young asserted in her testimony that the judge should return custody of Melea to her because she has changed. She claimed that she has gotten off drugs and said, "I have turned my life back to God." Ms. Young maintained that she is able to provide a stable home for Melea and thought that Melea should be raised with her brothers.

Ms. Young expressed concern about a prior sexual conviction against Mr. Boyce. In May 2003, prior to the parties' marriage, Mr. Boyce pleaded guilty to second-degree sexual assault committed against a twelve-year-old female who had been babysitting for Ms. Young's two boys. Ms. Young testified that after the criminal charges were filed, Mr. Boyce admitted to her that he had kissed and fondled the babysitter. She stated that she is "really worried about that charge," and that the reason she agreed to allow Mr. Boyce overnight and weekend visitation of Melea at the time of the divorce was because she was still on drugs and was not thinking clearly.

Ms. Young also expressed other concerns regarding Mr. Boyce, including his use of alcohol and profanity in Melea's presence. Ms. Young indicated that Mr. Boyce has a very bad temper, and has thrown her across the room and assaulted her while he was holding her daughter. Ms. Young further testified that her boys do not like Mr. Boyce and are afraid of him, and that Mr. Boyce had a problem with the fact that one of her sons is biracial. She stated that on one occasion she had come home from work and Mr. Boyce had written epithets across her sons' foreheads. According to Ms. Young, Mr. Boyce explained that he did this because he was "high" and was not thinking.

Donny Wright is a psychotherapist and has counseled Mr. Boyce as a requirement of Mr. Boyce's probation for the sexual assault conviction. Mr. Wright testified that Mr. Boyce

has done very well in therapy, and that Mr. Boyce admitted he made a mistake and deeply regrets the incident involving the babysitter. Mr. Wright stated that Mr. Boyce was inebriated during the incident and that there was nothing to indicate that any penetration had occurred. Mr. Wright stated that Mr. Boyce's contact with and discussion about his daughter exhibited an appropriate parent/child relationship, and that Mr. Boyce is very responsible. Mr. Wright saw no indication that Mr. Boyce is abusing drugs or alcohol, and he expressed no real concerns that Mr. Boyce poses a danger to any child, much less his own daughter. Mr. Wright acknowledged that Mr. Boyce is a Level 2 sex offender, with Level 1 being the lowest risk. And while acknowledging that there are some people who will habitually sex offend because they feel driven to do that, Mr. Wright thought that Mr. Boyce is not one of those people but rather "a guy who made a mistake."

Ms. Young's mother, Marietta Neff, testified next. Ms. Neff testified that she has been supporting her daughter for the past year and bought her the mobile home where she lives. Regarding the incident when Ms. Young accompanied Mr. Young to Florida, Ms. Neff testified that she went to Florida with Mr. Young's cousin, a bail bondsman, to bring both of them back to Arkansas. According to Ms. Neff, Mr. Young had written hot checks and stolen from family members, and had failed to appear in court. Ms. Neff corroborated her daughter's testimony that Mr. Boyce has a temper and that the two boys are afraid of him.

Justin Boyce, appellee's brother, testified that he has not seen any evidence that his brother has abused drugs or alcohol in the past two years. He stated that he had never seen his brother treat Melea or any other child in an inappropriate manner, and he characterized

him as a great father. The appellee's aunt also testified on his behalf and agreed that in her observations he is a great father and does "anything that a mom would do."

Eva White is Mr. Boyce's mother, and Mrs. White testified that Mr. Boyce and Melea reside with her and her husband. She stated that during the parties' marriage, she had custody of Melea between ages three to nine months at the consent of the parties. Mrs. White maintained that her home is free from drugs and alcohol abuse and that she has not seen Mr. Boyce do anything inappropriate in caring for Melea. Mrs. White stated that Melea is currently in a happy and stable environment.

Mr. Boyce testified on his own behalf and stated that he was once a methamphetamine user but was drug-free at the time of the divorce. He maintained that he has not used methamphetamine in two years and no longer drinks to excess. Mr. Boyce stated that he is employed as a lead man in a warehouse, where he has worked for years.

Mr. Boyce acknowledged that he pleaded guilty to second-degree sexual assault after he fondled a twelve-year-old girl's breasts, ran his hands over her vaginal area through her clothing, and touched her buttocks. His period of probation for the offense was sixty months, and he has paid his fine and probation fees, and reports to his probation officer monthly.

Mr. Boyce gave the following testimony about his offense:

When I look back on this incident, I know it was bad judgment on myself. I regret the fact that I did it. I know I should have known better. I wish I could take it back. I never meant to do no harm to her or my family. I just can't take it back. I just try to do my very best to live now and make up for it. There is no way I can make it up to this young lady, except my apologies, which I've done, but there's no way. At the time it happened, I was very inebriated. I had been to a party with Crystal. Crystal and Felicia left to purchase drugs and I went to check on the boys at our apartment where [the babysitter] was watching them. Crystal knew about the incident a few

hours later; [the babysitter] had confronted everyone. And we continued to live together and got married.

Ms. Young's minister, Lagrand Gary Moore, also testified. He stated that he has known Ms. Young for many years and that he has talked to her about her problems during her membership in the congregation. According to Reverend Moore, Ms. Young does not appear to be using drugs and appears stable. Reverend Moore stated that from all he has seen Ms. Young is doing a good job as a parent, and she seems to have her mind set on having a good home and being faithful to God.

Ms. Young's first argument on appeal is that the trial court erred in awarding a change of custody of Melea to Mr. Boyce because there was insufficient evidence of a material change in circumstances. In particular, Ms. Young argues that her leaving the State of Arkansas for three weeks while leaving Melea in Mr. Boyce's custody failed to meet the threshold requirement of a material change. She asserts that there was no evidence as to what effect her three-week absence had on the child, and further notes that she permanently returned to Arkansas on November 11, 2005, after which she divorced Mr. Young. Because this brief episode did not constitute a material change in circumstances, and there was no other proof of any material change since the time of the parties' divorce, Ms. Young contends that the trial court's order must be reversed.

We hold that the trial court did not err in finding that Mr. Boyce met his burden of proving a material change in circumstances. Since the time of the parties' divorce, Ms. Young married a convicted felon and admitted that throughout their marriage "we both stayed on drugs" and did not provide a drug-free home for Melea. In October 2005



Ms. Young accompanied Mr. Young to Florida where he avoided a probation revocation hearing, while leaving Melea with Mr. Boyce in Arkansas. She did not return until tracked down in Florida by her mother and Mr. Young's cousin, who is a bail bondsman. And after returning to Arkansas and being served with appellee's complaint to change custody, Ms. Young continued to use methamphetamine and advised that she could not pass a drug screen a month later on December 12, 2005.

In *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003), we held that a party seeking to modify custody must prove that a material change of circumstances has occurred since the last order of custody or that material facts existed at the time of the decree that were unknown to the court. Ms. Young's testimony in the present case indicated that she was a methamphetamine user at the time of the divorce, and while her continued use thus does not appear in itself to be a change in circumstances, it was evidently a fact unknown to the court when Ms. Young was granted primary custody. Therefore, Ms. Young's continued pattern of drug abuse and associated irresponsible behavior exhibited by her flight with Mr. Young to Florida were circumstances sufficient to open the issue of whether a change of custody was in Melea's best interest.

Ms. Young's remaining argument is that the trial court erred in finding that it was in Melea's best interest to be placed in the custody of her father given that he is a Level 2 sex offender. Under this point, Ms. Young alternatively argues that the trial court should have at least made specific findings that the sex offender posed no danger to the child. Appellant cites Ark. Code Ann. § 9-13-101(d) (Repl. 2008), which provides:

(d)(1) If a party to an action concerning custody of or a right to visitation with a child is a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., the circuit court may not award custody or unsupervised visitation of the child to the sex offender unless the circuit court makes a specific finding that the sex offender poses no danger to the child.

(2) There is a rebuttable presumption that it is not in the best interest of the child to be placed in the care or custody of a sex offender or to have unsupervised visitation with a sex offender.

Although the above legislation did not become effective until July 31, 2007, and therefore was not the law when this matter was decided, appellant nonetheless urges that it is good public policy. Given Mr. Boyce's admitted sexual abuse of a twelve-year-old girl, Ms. Young argues that he poses a risk to all children including Melea and that he should not have been awarded custody or even unsupervised visitation.

In cases involving child custody a heavier burden is cast upon the circuit court to utilize to the fullest extent all of its powers of perception in evaluating the witnesses, their testimony and the children's best interest. *Bailey v. Bailey*, 97 Ark. App. 96, \_\_ S.W.3d \_\_ (2006). This court has no such opportunity and we know of no case in which the superior position, ability and opportunity of a circuit court to observe the parties carries as great a weight as one involving minor children. *Id.* With these principles in mind, we hold that the trial court did not clearly err in finding that a change of custody to Mr. Boyce was in Melea's best interest.

Because Ark. Code Ann. § 9-13-101(d) was not yet effective when this case was decided, there was no statutory presumption that it was not in the child's best interest to be placed with her father, and the trial court was not required to make specific findings that Mr. Boyce posed no danger to the child. While Mr. Boyce's status as a sex offender was nonetheless an important factor to consider in this case, the trial court was also presented with

proof weighing in appellee's favor. There was evidence that Ms. Young continued to abuse methamphetamine after being awarded custody of Melea, while Mr. Boyce was free from alcohol or drug abuse during his temporary custody beginning in November 2005 and extending through the hearing. Mr. Boyce's psychotherapist did not think Mr. Boyce posed a risk to any children and there was evidence that Mr. Boyce had been providing Melea a stable and appropriate home. Mr. Boyce has maintained steady employment, while Ms. Young has relied extensively on support from her mother due to extended periods of unemployment. While Mr. Boyce's prior conviction for sexual assault against a minor is of considerable concern, that fact alone does not dictate the best interest of the child. Upon examining all of the evidence in the record and affording the trial court the deference to which it is entitled, we cannot say that its decision to award a change of custody based on the best interest of the child was clearly erroneous.

Affirmed.

PITTMAN, C.J., and MARSHALL, J., agree.